Dickson Trading (S) Pte Ltd v Transmarco Ltd

HIGH COURT (SINGAPORE) – SUIT NO 2443 OF 1987
CHAN SEK KEONG JC
8 DECEMBER 1987

Contract – Offer for sale of shares – Invitation to submit bids for shares – Whether invitation constituted a unilateral contract – Offers to be submitted by deadline – Effect of bid made after deadline – Whether the deadline was ineffectual, had been waived or extended

Civil Procedure – Interlocutory injunction to restrain disposal of shares – Whether plaintiff had chance of success at trial – Balance of convenience – Whether plaintiff should be granted limited injunction till outcome of appeal

The plaintiffs were unsuccessful bidders in competition with the successful bidders, the Tays, for all the issued shares of HG ('the shares'). HG was a wholly-owned subsidiary of the defendants. Both the plaintiffs and the Tays were invited to make bids for the shares by 6 pm of 13 August 1987. The Tays submitted a bid of $11m. The plaintiffs, however, submitted their bid of $11.2m 15 minutes after the deadline and were disqualified. The defendants then decided to proceed with the sale of the shares to the Tays.

The plaintiffs applied for an interlocutory injunction to restrain the defendants from disposing or parting with the shares. The plaintiffs also claimed that a contract was concluded between the plaintiffs and the defendants on 13 August 1987. On the day that the plaintiffs filed their action, they obtained an ex parte injunction on the terms sought but expiring on the date of their motion. The plaintiffs claimed that the defendants' invitation to the Tays and the plaintiffs to submit bids was in the nature of a unilateral contract, and that the plaintiffs by submitting a higher bid concluded the contract for the sale of the shares. It was also contended that the 6 pm deadline set was ineffectual or waived since it was an implied term of the unilateral contract that the defendants would do nothing to prevent the fulfilment of the condition specified in the invitation, and that since the invitation at first mentioned no deadline, the plaintiffs were entitled to a reasonable time to make their bid and the 6 pm deadline was not a reasonable time. Another argument was that SIMBL, the defendants' merchant bank advisers, had waived or extended the deadline by allowing W, the plaintiffs' advisers, to leave the plaintiffs' sealed bid with them and then opening it. The defendants claimed that their invitation was only an invitation to treat, and that they were not bound to accept the highest offer.

After hearing the submissions of counsel of all the interested parties, the plaintiffs' application was dismissed. The plaintiffs applied for an interim injunction pending the appeal.

Held, dismissing the applications:

(1) The correct approach was to consider the plaintiffs' case on the basis it was put, ie that the defendants had assumed a legal obligation to the plaintiffs conditional upon them submitting a higher bid by 6 pm on 13 August 1987. The only real issue then before the court was whether the 6 pm deadline was ineffectual or had been waived or extended by the defendants.

(2) The plaintiffs' submissions that the 6 pm deadline was ineffectual or had been waived or extended did not raise any triable questions of law or fact. If the offeror, ie the defendants, had assumed an obligation to allow the offeree to make his bid, then the offeree also has a corresponding obligation to make his bid in accordance with the offer. No implied term was necessary to give effect to a unilateral contract. In addition, a term as to reasonable time for performance cannot be implied when it is the performance itself which brings forth the contract.

(3) Furthermore, although the offeror in a unilateral contract has an obligation not to revoke the offer after the offeree has embarked on the performance of the condition, the defendants had neither revoked their offer nor prevented the plaintiffs from submitting a bid. The plaintiffs could not blame the defendants for not supplying them with all the information they required because the defendants were under no obligation to supply such information and the plaintiffs were in a position to make a well-judged bid.

(4) Thirdly, the unilateral contract, not having been converted into a synallagmatic contract by a timely bid, lapsed and ceased to exist at the expiry of 6 pm on 8 August 1987. The plaintiffs therefore had no prospect of success at trial.

(5) Although it was unnecessary to consider the application on the balance of convenience, if it were necessary the issue would have been decided in favour of the Tays and the defendants for the following reasons. Firstly, if the interlocutory injunction was not granted, all the plaintiffs would have lost would be the opportunity to carry on business in a company where trading conditions might change from year to year. As against this, the defendants would lose the certainty of having a cash asset of $11m as a result of many reasons, eg the Tays being no longer bound to complete the contract.

(6) In addition, the real dispute was between the plaintiffs and the Tays. As far as the defendants were concerned, they had sold the shares to either the plaintiffs or the Tays. The effect of granting the injunction would be to deny the defendants payment.

(7) An interlocutory injunction would also cause a great deal of inconvenience to the Tays as they would not know whether they would be managing the company for their own benefit or for the benefit of the plaintiffs. The company's business and staff morale would be adversely affected.

(8) The cases cited by counsel for the defendants and the Tays involved applications for stays of execution of final judgments after full trial, and were therefore not relevant to stay of interlocutory orders. The likelihood of an appeal, if successful, being rendered nugatory, is sufficient ground for a stay of execution.

(9) In the circumstances of the case, however, a limited injunction pending appeal would not be granted on the ground that the plaintiffs' action, if ultimately successful, would not be affected by their failure to obtain the injunction. This was because the Tays were purchasers of the shares with notice of the plaintiffs' rights and would therefore take them subject to the prior claim of the plaintiffs (if any were established later).

[*Editorial Note*: Consequent upon the judgment, the defendants applied to strike out the plaintiffs' statement of claim. In a judgment dated 29 April 1989, the assistant registrar dismissed the application. This judgment will be reported in a subsequent issue.]

Cases referred to

1 *Harvela Investments Ltd* v *Royal Trust Co of Canada (CI) Ltd & Ors* [1984] 2 All ER 65 (HC); [1985] 1 All ER 261 (CA); [1985] 2 All ER 966 (HL) (distd)

2 *American Cyanamid Co* v *Ethicon* [1975] AC 396 (refd)

3 *Daulia Ltd* v *Four Millbank Nominees Ltd* [1978] 2 All ER 557 (distd)
4 *Erinford Properties Ltd & Anor* v *Cheshire County Council* [1974] Ch 261 (refd)
5 *Serangoon Garden Estate Ltd* v *Ang Keng* [1953] MLJ 116 (distd)
6 *Syarikat Berpakat* v *Lim Kai Kok* [1983] 1 MLJ 406 (distd)
7 *Wilson* v *Church (No 2)* (1879-80) 12 Ch D 454 (refd)

Tongel Yeo and *Peter Chong* for the plaintiffs.
Michael Hwang and *Loh Wai Mooi (Ms)* for the defendants.
J Grimberg and *K Shanmugam* for the interveners.

Cur Adv Vult

Chan Sek Keong JC: This is a motion by the plaintiffs for an interlocutory injunction to restrain the defendants, whether by themselves, their directors, officers, servants or agents of any of them or otherwise from parting with or disposing of any of the 3,650,000 shares ('the Hour Glass shares') being all the issued shares owned by the defendants in The Hour Glass Pte Ltd ('the company') otherwise than to the plaintiffs until judgment in this action or further order.

After hearing the submissions of counsel for all the interested parties, I dismissed the plaintiffs' application. The plaintiffs then applied for an interim injunction pending an appeal against my order. I also dismissed this second application. I said I would give my reasons for dismissing both applications. Here are my reasons.

(A) *Application for interlocutory injunction*

The company is a wholly-owned subsidiary of the defendants who in turn are a subsidiary (53.23%) of Metro Holdings Ltd, a public company whose shares are quoted in the Stock Exchange of Singapore. The plaintiffs were the unsuccessful bidders in competition with the successful bidders, viz Dr Henry Tay and Madam Chan Siew Lee ('the Tays') for the Hour Glass shares.

The facts as seen by the plaintiffs were as follows: On 16 July 1987 three representatives of the plaintiffs, one of whom was Yeo Hung Khiang ('HK Yeo'), the managing director of the plaintiffs, met with two representatives of the defendants, one of whom was Jopie Ong ('JO'), the chairman of the board of directors of the defendants, to discuss the plaintiffs' interest in the acquisition of the company. At this meeting, the defendants invited the plaintiffs to bid for the Hour Glass shares. No deadline was set for the bid but the plaintiffs were informed by the defendants that there was a rival bidder, ie the Tays, and that the defendants' merchant bank advisers, viz Singapore International Merchant Bank Ltd ('SIMBL'), had valued the said shares at between $10m and $14m. JO also said that the primary objective of the defendants was to secure the highest offer without qualification for the benefit of their shareholders. The plaintiffs' interpretation or understanding of this statement was that it was an assurance or representation that the highest offer would be accepted.

On 20 July 1987, the plaintiffs engaged the merchant bankers Wardley Ltd ('Wardley') as advisers in the proposed acquisition and informed the defendants accordingly. On 1 August 1987, Wardley wrote to SIMBL and asked for information on 13 items and also the closing date for bids to be received. They were not given all the information they required.

Then on 7 August 1987, Wardley wrote to SIMBL as follows:

> ... Our client is seriously interested in making a formal approach to your client to purchase the whole of the share capital of 'Clockwork'. We have been retained specifically for that purpose. Our client is able to move extremely quickly but, clearly, can only do so with the benefit of an understanding of the business and, for that purpose, information on the key areas is needed.
>
> Our client is aware of the price level which your client has in mind for the company and, on the basis of the information currently available, has not been dissuaded from proceeding with the matter. We now look forward to receiving the further information mentioned during today's meeting which will enable us to form a clearer view on price.
>
> We appreciate that this is a competitive position and we are therefore proceeding as quickly as possible. We would hope that, if your client intends to accept an offer from the other party, that prior to doing so it would give our client the opportunity to formalize its position before giving any acceptance of a competing offer.

By 12 August 1987, Wardley had still not been given all the information they required. Then on 13 August 1987, a series of events occurred in quick succession:

(a) at about 11.16 am, the plaintiffs' chairman, Dickson Poon ('DP'), was informed by JO that the plaintiffs' bid should be submitted by the end of that day;
(b) at about 2.56 pm, DP was informed by JO that the deadline was 6 pm; DP, although unhappy about the deadline, said the plaintiffs would make a bid;
(c) according to Jeremy Figgins ('JF') of Wardley, DP informed him at about 3.20 pm that the deadline for the bid was 6 pm;
(d) between 3 to 4 pm, JF telephoned JO and was told that the deadline was 6 pm;
(e) at about 5.15 pm, DP informed JO that he did not have enough time but JO replied that the deadline was 6 pm and that the plaintiffs' bid could be faxed to SIMBL;
(f) by about 5.40 pm, JF had received instructions from DP to submit a bid of $11.2m on behalf of the plaintiffs;
(g) at about 5.45 pm, Dawn Chua ('DC') of Wardley telephoned HO to tell him that Wardley was in the process of preparing the plaintiffs' offer and Wardley would therefore be arriving at SIMBL's office with the plaintiffs' bid at about 15 to 20 minutes late;

(h) according to JF, HO telephoned DC at about 6.05 pm to inquire when the plaintiffs' bid would arrive and was told that DC and JF were then just leaving for SIMBL's office;

(i) DC and JF arrived at SIMBL's office at about 6.12 pm to 6.15 pm and were told by HO that the Tays had insisted that the plaintiffs' bid be disqualified; Paul Hooi of SIMBL then asked 'What's your bid' to which JF replied that it was in the sealed envelope which should be opened in the presence of all parties concerned. SIMBL's representatives then went to see the Tays; about 5 to 10 minutes later, HO came back and told JF that the Tays had threatened legal action against the defendants if SIMBL chose to consider the plaintiffs' offer. HO then spoke with JO on the telephone and invited JF to discuss the matter with JO. JF declined to do so and left the sealed bid with HO for proper consideration by SIMBL in the best interest of their clients;

(j) at about 6.30 pm, HK Yeo was informed by JO that the plaintiffs' bid had been disqualified, that the Tays' bid was $11m and that the plaintiffs' sealed envelope would not be opened. HK Yeo replied that the plaintiffs' bid was higher;

(k) at 7 pm, HK Yeo was informed by Wardley that SIMBL had subsequently opened the plaintiffs' sealed envelope.

The plaintiffs' bid as set out in their letter of 13 August 1987 was as follows:

> On behalf of our client, Dickson Trading (S) Pte Ltd, we offer to acquire the whole of the issued share capital of The Hour Glass (Pte) Ltd for an aggregate consideration, payable in cash of S$11,200,000.
>
> The only warranty in respect of the sale is that the shares will be free from all liens, charges and encumbrances.

On 14 August 1987, the plaintiffs wrote a letter to the defendants in which they put on record the events that had transpired and made the following points:

(i) that the plaintiffs' bid could not be faxed to SIMBL for obvious reasons;

(ii) that time was not of the essence and this was fortified by SIMBL 'accepting' the sealed envelope and opening it later;

(iii) because of JO's representation, the plaintiffs' bid at $11.2m was the successful bid and they were ready to pay the deposit.

On learning that the defendants had decided to proceed with the sale of the shares to the Tays, the plaintiffs on 14 September 1987 commenced this action against the defendants for the following reliefs:

(1) A declaration that the disqualification of the plaintiffs' bid was ineffectual to determine the agreement dated on or about 13 August 1987 and made between the defendants and the plaintiffs for the sale by the defendants to the plaintiffs of 3,650,000 ordinary shares of $1 each in The Hour Glass Pte Ltd (hereinafter called 'the said shares').

(2) A declaration that there was a binding contract between the plaintiffs and the defendants on or about 13 August 1987 for the sale of the said shares for the sum of S$11.2m.

(3) An injunction restraining the defendants, whether by their directors, officers, servants or agents, or any of them or otherwise howsoever, from parting with or disposing any of the said shares otherwise than to the plaintiffs.

On the same day, the plaintiffs applied ex parte and obtained an interlocutory injunction in terms of and expiring on the date of this motion.

The facts as seen by the defendants were as follows: At the meeting of 16 July 1987, JO had not made any representation to the plaintiffs as the sale required the defendants' approval. Between 16 July and 12 August 1987, no material event occurred. On 13 August 1987, JO imposed the deadline of 6 pm in the manner earlier described. The defendants' account of the timing of certain events was slightly different, eg (a) JO received a telephone call from JF shortly after 5.15 pm when he told JF that the deadline was 6 pm and (b) HO called DC just before 6 pm and not at 6.05 pm.

In addition, the following events also took place on 13 August 1987:

(i) at 3 pm, JO called Madam Chan Siew Lee to tell her that any offer on behalf of the Tays and the plaintiffs should be submitted to SIMBL by no later than 6 pm that evening;

(ii) shortly after talking to JF at about 5.15 pm, HO repeated his earlier instruction that all offers must be in before 6 pm; he also told Harry Ong to expect a telefax from Wardley as DP had told him that an offer would be made before 6 pm;

(iii) at about 5.30 pm to 5.45 pm, HO informed DC that Madam Chan Siew Lee had arrived with her bid and was waiting to see if the deadline would be breached by Wardley;

(iv) shortly after 6 pm, JO was informed by HO that Wardley had not arrived although they had said they were coming with an offer; JO then instructed Harry Ong not to accept plaintiffs' offer and that the Tay's offer be accepted, subject to the approval of the defendants' shareholders.

The Tays' bid was as follows:

> We refer to the various discussions between our clients (Dr Henry and Mrs Jannie Tay also known herein as the 'Tays') and yourself on the sale and purchase of the entire issued share capital of Hour Glass Pte Ltd ('The Hour Glass' or 'the company').
>
> We hereby on behalf of the Tays write to make you an offer on the following principal terms and conditions:

(1) the purchase consideration for the entire issued and paid up capital of The Hour Glass is a cash sum of S$11m (Singapore dollars: eleven million only);
(2) a cheque for S$550,000 representing 5% of the purchase consideration is attached (this amount is to be refunded if there would be any occurrence that constitutes an event of frustration);
(3) within seven days of receipt of your confirmation of this letter and in any event no later than 21 August 1987, the sale and purchase agreement, in form and substance satisfactory to both parties will be signed, whereupon a further 5% of the purchase consideration will be paid;
(4) the date of completion of the sale and purchase is to be not later than 28 September 1987. Mr Harry Ong of Singapore International Merchant Bankers Limited has verbally confirmed to NM Rothschild & Sons (Singapore) Limited that the proposed completion date is reasonable;
(5) on the date of completion of the sale and purchase, the following will be discharged or performed by the Tays:
    (i) the guarantees to the lending banks provided by Transmarco Limited on behalf of the company will be discharged;
    (ii) inter-company borrowings between Transmarco Limited and the company, if any, will be discharged;
    (iii) the payment of the balance of 90% of the purchase consideration; and
    (iv) all the shares of the Hour Glass representing its entire issued and paid up capital shall be delivered by Transmarco to the Tays free from all liens, charges and encumbrances;
(6) we will require an undertaking from Metro Holdings Limited that it will vote in favour of the sale of the company at the subsequent EGM of Transmarco Limited that will be convened; and
(7) the usual warranties and conditions in a sale and purchase agreement for a private company would apply.

Please acknowledge your confirmation of the agreement by signing on the duplicate copy of this letter and return to us as soon as possible.

This letter constitutes an offer and to which your confirmation would be the acceptance.

On 17 August 1987, the defendants and the Tays agreed to certain supplementary terms and conditions which provided, inter alia, that completion shall be postponed if the defendants are restrained by court order to proceed with the sale and that if such injunction were not lifted by 30 June 1988, the parties were released from their mutual obligations. All these terms were then incorporated in a formal agreement dated 27 August 1987.

The facts as seen by the Tays were as follows. In May 1987 they appointed NM Rothschild & Sons (Singapore) Ltd ('Rothschild') to advise them on the acquisition of the Hour Glass shares. By 29 June 1987, the defendants had agreed to sell the company to the Tays subject only to agreement on the price. Subsequently, SIMBL indicated the value of the company to be between $10m to $11.7m whereas Rothschild valued it at $7.4m.

On 7 August 1987, Dr Henry Tay made a written offer to JO to buy the company at $10m. The Tays then learnt that the defendants were also negotiating with another party, who were the plaintiffs. The Tays were unhappy about this situation and on 12 August 1987 expressed their concern to the defendants about giving more time to the plaintiffs.

On the morning of 13 August 1987, the Tays met with JO and accepted JO's offer of $11m. When JO requested the plaintiffs and the Tays to submit their bids by 6 pm, the Tays considered this move by JO as a breach of their earlier agreement. So they issued a written protest and, having decided to reserve their rights, agreed nevertheless to participate in the competitive bidding with the plaintiffs. Accordingly, on that day, the Tays submitted their bid by 5.50 pm and the events that subsequently occurred were as earlier described.

The only other relevant fact which was common ground between the plaintiffs, the defendants and the Tays in these proceedings was that the sale by the defendants of the Hour Glass shares was subject to the approval of the defendants' shareholders as required by the Listing Manual of the Stock Exchange of Singapore.

Counsel for the plaintiffs contended that on the plaintiffs' version of the events that had occurred, the plaintiffs had, on the law, a concluded contract with the defendants. The plaintiffs' case was that the contract was partly oral, ie the oral invitation and the representation made to the defendants on 16 July 1987, and partly by conduct, based on the events that took place thereafter, ie the plaintiffs engaging Wardley to advise them, the submission of the bid at 6.15 pm. Counsel submitted that the terms of the invitation was in the nature of a unilateral contract. He referred to the case of *Harvela Investments Ltd* v *Royal Trust Co of Canada (CI) Ltd & Ors*[1] in which all the nine judges involved in the High Court, the Court of Appeal and the House of Lords, were in agreement that an offer of this character went beyond an invitation to treat and was in itself an offer capable of being accepted by a bid in response to that invitation.

Counsel relied on the following passages in the judgment of Lord Diplock in support of his contention:

> It [ie the telex invitation] was not a mere invitation to negotiate for the sale of the shares in Harvey & Co Ltd of which the vendors were the registered owners in the capacity of trustees. Its legal nature was that of a unilateral or 'if' contract, or rather of two unilateral contracts in identical terms to one of which the vendors and Harvela were the parties as promisor and promisee respectively, while to the other the vendors were promisor and Sir Leonard was promisee. Such unilateral contracts were made at the time when the invitation was received by the promisee to whom it was addressed by the vendors; under neither of them did the promisee, Harvela and Sir Leonard respectively, assume any legal obligation to anyone to do or refrain from doing anything.

> The vendors, on the other hand, did assume a legal obligation to the promisee under each contract. That obligation was conditional on the happening, after the unilateral contract had been made, of an event which was specified in the invitation; the obligation was to enter into a synallagmatic contract to sell the shares to the promisee, the terms of such synallagmatic contract being also set out in the invitation. The event on the happening of which the vendors' obligation to sell the shares to the promisee arose was the doing by the promisee of an act which was of such a nature that it might be done by either promisee or neither promisee but could not be done by both.

In *Harvela*,[1] the vendors, as trustees, held a block of shares in a company which, if acquired by one or other of the two remaining shareholders, viz Sir Leonard and Harvela, would give control to that shareholder. The trustees wished to sell the trust shares. Both Sir Leonard and Harvela made offers at different prices on different terms and expiring on different dates. The trustees decided to invite Harvela and Sir Leonard to submit revised offers on identical terms and conditions. They sent a telex to each of the bidders (which as subsequently amended) was as follows:

> We have before us two similar offers but subject to differing terms and conditions and value. Accordingly we invite you to submit to [Royal Jersey] any revised offer which you may wish to make by sealed tender or confidential telex to be submitted to our London solicitors, Messrs Bischoff and Co ... by 3 pm London time Wednesday, 16 September 1981, attention J Jowitt who has undertaken not to disclose any details of any revised offer to any party before that time ... Tenders are to be submitted on the following terms: (1) That tenders are a single offer for all shares held by us ... (5) In the event that closing shall not take place within 30 days [other than by reason of any delay on our part] interest shall be payable by the purchaser on the full purchase price at a rate higher by 4% than the Bank of Montreal prime rate from time to time for Canadian dollars loans ... C) We confirm that if any offer made by you is the highest offer received by us we bind ourselves to accept such offer provided that such offer complies with the terms of this telex.

Harvela submitted a timely bid of C$2,175,000. Sir Leonard duly submitted a timely referential bid of 'C$2,100,000 or C$101,000 in excess of any other offer you may receive which is expressed as a fixed monetary amount, whichever is the higher'. At 4.40 pm on that day, Harvela was informed that his tender had been unsuccessful. Sir Leonard's bid was subsequently accepted.

Harvela disputed the validity of Sir Leonard's bid and sued the trustees for specific performance. The High Court held that the referential bid of Sir Leonard was invalid, that Harvela's bid was the successful bid at the expiry of the deadline of 3 pm and that the subsequent acceptance by the trustees of Sir Leonard's bid had no effect: see [1984] 2 All ER 65. The Court of Appeal reversed Gibson J's decision: see [1985] 1 All ER 261; and were themselves reversed by the House of Lords: see [1985] 2 All ER 966.

It should be noted that it was not the case for the plaintiffs that the Tays were competitive bidders subject to or on the same terms and conditions as the plaintiffs were. The plaintiffs were completely unaware of the terms and conditions applicable to the Tays' bid except that both bidders had to submit their bids by 6 pm on 13 August 1987 and that, in so far as the plaintiffs were concerned, the defendants would accept the highest bid.

Following Lord Diplock's analysis, counsel contended that the defendants had assumed a legal obligation to the plaintiffs when the latter submitted the higher bid on 13 August 1987 and the obligation of the defendants thereafter was to sell the shares to the plaintiffs. However, the reality was that the plaintiffs had only submitted their bid at 6.15 pm. To get over this difficulty that the plaintiffs had not fulfilled the condition upon which the defendants' obligation would have arisen, counsel was constrained to contend that the 6 pm deadline was ineffectual or waived or extended on the following grounds:

(1) there was an implied term in the unilateral contract that the defendants would do nothing to prevent the fulfilment of the condition specified in the invitation; further, as the invitation made on 16 July 1987 mentioned no time for submission of the bid, the plaintiffs were entitled to a reasonable time to do so; the deadline of 6 pm imposed on 13 August 1987 was unreasonable as the defendants knew that the plaintiffs did not have sufficient information about the company to make a timely bid; the defendants had therefore prevented the plaintiffs from making a timely bid and therefore the 6 pm deadline was ineffectual, it being a breach of the implied term;

(2) alternatively, SIMBL had either waived or extended the deadline by allowing Wardley to leave the plaintiffs' bid with them and then opening it.

As regards the requirement of shareholders' approval, counsel contended that it was a mere formality since JO, being chairman of the board of directors of the defendants, had impliedly undertaken to procure and was able to procure such approval. Thus this requirement should not prevent the plaintiffs from obtaining specific performance.

There was thus, it was argued, a serious question as to whether the plaintiffs had a concluded contract with the defendants on 13 August 1987 in terms of the principles laid down in *American Cyanamid Co* v *Ethicon*.[2] Counsel's submission on the balance of convenience was that since the plaintiffs were the only party which had come to court with clean hands (because, it was alleged, the defendants had preferred the Tays by refusing to give full information about the company to the plaintiffs), and that they would undertake to prosecute this action diligently, an interlocutory injunction should be granted to maintain the status quo.

The defendants' case was that (a) there was no triable issue on the question of a contract between the parties; (b) even if there were a contract, specific performance could not be granted in the circumstances of this case; and (c) in any event, on the balance of convenience the interlocutory injunction should not be granted.

On the contract point, it was submitted, firstly, that the invitation to the plaintiffs to bid for the shares was an invitation to treat for the following reasons:

(a) invitations to bid (whether at auction or to submit tenders as here) without a reserve price are normally construed as invitations to bid as otherwise the vendor may be forced to sell at an absurdly low price;
(b) even in an auction without a reserve price, the vendor is not obliged to accept the highest offer, but the offeror may sue the auctioneer or the vendor (as to which there is a doubt) under a collateral contract;
(c) as the sale was subject to the approval of the shareholders of the defendants, the defendants could not have accepted the plaintiffs' bid without that qualification even if JO had represented to the plaintiffs that the highest offer would secure the sale;
(d) since no date for submitting bids was set by the defendants until 13 August 1987, and as there was no stipulation that bids must be sealed or confidential, both the plaintiffs and the defendants could have made open bids and counterbids during this interval;
(e) the setting of the deadline on 13 August 1987 constituted new offers to both parties to submit their bids by 6 pm, without any representation being made that the highest offer would secure;
(f) the Tays' agreement to supplementary terms and conditions on 17 August 1987 and the signing of the formal agreement on 27 August 1987 in respect of the sale indicated that the invitations were invitations to treat as not all the terms of the sale had been agreed upon.

Secondly, it was submitted that the present case was not a *Harvela*[1] situation. In *Harvela*,[1] there were two invitations made on identical terms and conditions to two rival bidders, including the undertaking of the vendor to accept the highest sealed or confidential bid submitted by the stipulated time. The facts here were different in the following respects: (a) in *Harvela*,[1] but not here, the vendors expressly agreed to accept the highest bid; (b) in *Harvela*,[1] but not here, the bids were sealed or confidential bids; (c) in *Harvela*[1] there was a common deadline, but not here if, as contended by counsel for the plaintiffs, the deadline was waived or extended in favour of the plaintiffs only; (d) here but not in *Harvela*,[1] the agreement was subject to shareholders' approval.

Thirdly, counsel submitted that even if the defendants' invitations were unilateral contracts of the type in *Harvela*,[1] then the plaintiffs' action would still fail on the ground that at the expiry of the 6 pm deadline, the Tays had submitted their bid but the plaintiffs had not and therefore the Tays' bid was the only valid bid. Thus, counsel reasoned, the plaintiffs' case was bound to fail, in whichever possible way it was postulated.

As to specific performance, counsel contended that it should not be granted as it would be an exercise in futility since the Tays already had a binding contract and also the defendants' shareholders had clearly demonstrated that they would not approve a sale to Dickson.

Counsel for the Tays, to whom counsel for the plaintiffs conceded the right to be heard, augmented the plaintiffs' case with the submission that Wardley by the terms of their letter of 4 August 1987, had understood the defendants' invitation as an invitation to treat. On the issue of specific performance, he contended that the court would not grant this remedy as it would amount to directing (i) the parties to negotiate and (ii) Metro Holdings Ltd to vote in favour of the sale of the Hour Glass shares to the plaintiffs, something which the court could not do.

Those were the arguments advanced before me. Although all the circumstances of this case suggested that the defendants' invitation to the plaintiffs was more likely to have been an invitation to treat than a unilateral contract, I found it unnecessary to make a finding on this issue as I was able to dispose of this matter on another ground. Also in so far as this issue was dependent on a finding as to the substance and effect of the defendants' alleged representation, an issue of mixed fact and law would have to be dealt with first. Apart from the submission that the defendants' invitation was one to treat, the other submissions of counsel for the defendants and the Tays did not really meet the plaintiffs' submissions head on. Thus, although I agreed with the Tays' argument that the plaintiffs would not be entitled to specific performance in the absence of the approval of the defendants' shareholders to the sale of the shares to the plaintiffs, it did not follow from this that their entire action would fail. The plaintiffs had also sought a declaration that they had a binding contract with the defendants and were they granted this relief, the sale would then have to be put to the vote of the defendants' shareholders. There would be no question of the court directing them how to vote or directing the parties to negotiate because there would be no additional terms for negotiation. It would simply be a case of payment in full in exchange for the shares.

Similarly, the submission of counsel for the defendants that even if the plaintiffs' case were a *Harvela*[1] situation, it would fail was also misconceived. On the facts, there was no dispute between the defendants and the Tays that the defendants had made an offer to the Tays which could result in a binding contract by the Tays

submitting a higher bid. As far as both these parties were concerned, the defendants' invitation to the Tays was an invitation to bid. The Tays did not have a unilateral contract and therefore their bid did not result in a synallagmatic contract between them and the defendants. Counsel's hypothesis was therefore inappropriate as built into it was an assumption of fact which was not only inconsistent with actual evidence but was bound to result in the destruction of the plaintiffs' case as thus postulated.

In my view, the correct approach was to consider the plaintiffs' case on the basis it was put, ie the defendants had assumed a legal obligation to the plaintiffs which was conditional upon the submission of a higher bid by 6 pm on 13 August 1987. Now, on this basis, it could not be disputed by the plaintiffs that they had not fulfilled this condition when 6 pm expired. But their case was that they were able to fulfil the condition by submitting a higher bid at 6.15 pm. It followed that the real issues before the court were whether the deadline of 6 pm was ineffectual or had been waived or extended by the defendants. If the plaintiffs failed on these two issues, they would have failed to prove any contract with the defendants.

In my view, the submissions that the deadline was ineffectual or had been waived or extended were without substance. They did not raise any triable issues of law and of fact. Firstly, the term could be implied that the plaintiffs were entitled to a reasonable time to make their bid. An offeror in such a situation has no such obligation whatever to an offeree; if the offeror has assumed an obligation to allow the offeree to make his bid, the offeree also has a corresponding obligation to make his bid in accordance with the conditions of the offer. A term can only be implied into a contract when there is a binding contract in order to give efficacy to the contract upon the presumed intention of the parties: see 9 *Halsbury's Laws of England*, 4th Ed, para 355. No such term is necessary to give effect to a unilateral contract. Moreover a term as to reasonable time for performance cannot be implied when it is the performance itself which brings forth the contract. In *Harvela*,[1] Gibson J (at p 76) described a unilateral contract as:

> a contract brought into existence by the act of one party in response to a conditional promise by another.

Secondly, although the offeror in a unilateral contract has an obligation not to revoke the offer after the offeree has embarked on the performance of the condition (see Goff LJ in *Daulia Ltd* v *Four Millbank Nominees Ltd* [3] at p 561), the defendants had neither revoked their offer nor prevented the plaintiffs from submitting a bid. If, as alleged, the plaintiffs had a unilateral contract on 16 July 1987, then they had plenty of time to submit their bid. No bid was submitted until the defendants had imposed the deadline. The plaintiffs could not really blame the defendants for not supplying them with all the information they required because (a) the defendants were under no obligation to supply such information and (b) the plaintiffs were in a position to and did make a well-judged bid. That it was submitted only at 6.15 pm was due entirely to their own fault or caution. The bid letter was short and simple and could have been prepared well before 5.45 pm. Moreover, it could have been faxed to SIMBL on a confidential basis but the plaintiffs decided not to do so. It could not be said that the plaintiffs had not had sufficient time to submit or had been prevented from submitting a timely bid.

Thirdly, the 'unilateral contract', not having been converted into a synallagmatic contract by a timely bid, lapsed and ceased to exist at the expiry of 6 pm on 13 August 1987. The bid submitted at 6.15 pm could not have been a submission made pursuant to a non-existent unilateral contract. The defendants could, of course, have made a new offer to the plaintiffs on the same terms with a new expiry date but, there was no evidence that such an offer had been made and what the terms (including the new deadline) were. They could not have done so without making another offer, whatever its terms may be, to the Tays in view of the overriding consideration to obtain the highest or the best price for the shares. For this reason, the conduct of SIMBL in allowing the bid to remain with them and in opening it later could not amount to making a new offer to the plaintiffs.

The plaintiffs therefore had no prospect of success at the trial and I so held. It was therefore unnecessary for me to consider the application on the balance of convenience. However, if it had been necessary, I would have had no hesitation in deciding this issue in favour of the defendants and the Tays for the following reasons. Firstly, if an interlocutory injunction were not granted, all that the plaintiffs could ultimately lose would have been the opportunity to carry on the business of the company. This would not necessarily be a loss to them as there was no certainty that the business would give an adequate commercial return on their investment. The company's principal business was the purveying of expensive and luxurious time pieces for the rich and trading conditions affecting such business might change from year to year. As against that, the defendants would lose the certainty of having a cash asset of $11m and this could occur for many reasons, eg if the sale to the Tays were not completed by June 1988, the Tays would no longer be bound by their contract, but with no corresponding certainty that in that situation the plaintiffs would or would be able to complete the sale. If trading conditions were to change, it might even be possible for the plaintiffs to discontinue its action against the defendants after that date. Moreover, the real dispute in this matter was between the plaintiffs and the Tays. As far as the defendants were concerned, they had sold the shares and they should be entitled to be paid for them either by the plaintiffs or the Tays. The result of granting an interlocutory injunction would be to deny them payment. Second-

ly, if an interlocutory injunction were granted, great inconvenience would also be caused to the Tays. They would not know whether they would be managing a company for their own benefit or for the benefit of the plaintiffs. The morale of the staff would be affected by the absence of job security and this would in turn lead to a diminution in employment loyalty. The company's business is more likely than not to be adversely affected by the grant of an interlocutory injunction.

(B) *Interim injunction pending appeal*

In this application, counsel for the plaintiffs relied on the well-known authority of *Erinford Properties Ltd & Anor* v *Cheshire County Council* [4] and contended if a limited injunction was not granted, the plaintiffs' appeal, if successful, would be rendered nugatory by the defendants and the Tays taking immediate steps to complete the transaction. It was suggested that the grant of a limited injunction would cause the defendants and the Tays no inconvenience as they had provided for the contingency of an appeal by having mutually agreed to release each other from completing the sale if any injunction were not lifted by June 1988.

Counsel for the defendants and the Tays advanced two arguments against the grant of a limited injunction. First, that it was not sufficient that the plaintiffs could not be restored to his original position: there must also be other grounds, eg that there were merits in the appeal. Reference was made to *Serangoon Garden Estate Ltd* v *Ang Keng*[5] and *Syarikat Berpakat* v *Lim Kai Kok*[6] as authorities for the proposition. Then it was argued that since the court had held that there was no serious issue to be tried, it must therefore follow that the plaintiffs' case had no merits and that it was frivolous and vexatious. Reference was made to (a) *Erinford Properties*[4] where Megarry J said (at p 268):

> There will, of course, be many cases when it would be wrong to grant an injunction, pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid and so on. But, subject to that, the principle is that to be found in the leading judgment of Cotton LJ in *Wilson* v *Church (No 2)* ...

and (b) *American Cyanamid*[2] where Lord Diplock said (at p 417):

> The court ... must be satisfied that the claim is not frivolous and vexatious; in other words, that there is no serious question to be tried.

I do not agree with these submission of counsel for the defendants and the Tays. Both the *Serangoon Garden*[5] case and the *Syarikat Berpakat*[6] case concerned applications for stay of execution of final judgments after full trials. The present application was in effect a stay of an interlocutory order. In my view, there is a difference in substance and not merely in degree between the two situations. Further, I am also of the view that the decision of Brown J was wrong. In that case, the respondent was not represented and only counsel for the appellant (against an order granting a stay) argued the point. No authority has been cited in the judgment. These two decisions are inconsistent with the general principle applied in the authorities cited in 1985 *Supreme Court Practice* para 59/13/1 and in *Wilson* v *Church (No 2)*[7] where Cotton LJ (at p 458) said:

> when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.

Brett LJ was even more emphatic. His Lordship said:

> ... the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory ... That rule must be acted upon unless this is an exceptional case.

In my view, the likelihood of an appeal, if successful, being rendered nugatory, is a sufficient ground for a stay of execution. I am also of the opinion that the exceptions laid down by Megarry J for denial of a limited injunction are no longer applicable under the new regime established by *American Cyanamid*[2] as they have the effect of negating the court's jurisdiction to grant a limited injunction where it has refused an interlocutory injunction on the ground either that there is no serious issue to be tried (ie the action is frivolous and vexatious) or that the balance of convenience is in favour of the other party. I do not accept that the decision in *American Cyanamid*[2] was intended to limit or had the effect of limiting the jurisdiction of the court to grant a limited injunction in such cases.

Having said all that, I nevertheless, in the circumstances of this case, refused the plaintiffs a limited injunction not because there was no possibility of my decision being reversed or varied on appeal or that the appeal would not be rendered nugatory in the limited sense that the completion of the transaction between the defendants and the Tays could be unscrambled by an appellate court, but on the more fundamental ground that the plaintiffs' action, if ultimately successful, would not be affected by their failure to obtain an interlocutory injunction. On this point, I accepted the contentions of counsel for the defendants and the Tays that the Tays were purchasers of the shares with notice of the plaintiffs' rights and, as such, would take them subject to the prior claim of the plaintiffs (a position which counsel would have to accept if the plaintiffs succeeded in proving). Indeed, if this argument had been advanced earlier in the first application, I would have refused the plaintiffs' application on the ground that an interlocutory injunction would have been unnecessary to protect the plaintiffs' claim to the shares in these proceedings.

Order accordingly.

Solicitors: *Peter Chong & Partners*; *Allen & Gledhill*; *Drew & Napier*.

Reported by *Terence Tan Bian Chye*